IN THE MISSOURI SUPREME COURT

SC No. 85315

JOHN W. HAMMOND,
APPELLANT,

Vs.

MUNICIPAL CORRECTION INSTITUTE
And, the CITY OF KANSAS CITY, MISSOURI,
RESPONDENT
Case No. 00-CV-214729
WD 61438

Appeal from the Circuit Court of
the County of Jackson, Missouri
Division 15
The Honorable Preston Dean

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal arises from a Dismissal with Prejudice rendered against Plaintiff John Hammond and in favor of defendant MCI and the City of Kansas City, Missouri on January 16, 2002. [L.F. 0036 -0037]. Plaintiff appeals from the Dismissal for failure to comply with the time requirements of the Missouri Human Rights Act.

Plaintiff has alleged a claim for violations of the MHRA against the Defendant MCI arising out of Plaintiff's work with that entity. Plaintiff raises for assignment of error the following issues: first, whether the trial court erred in dismissing Plaintiff's causes of action based upon improperly naming MCI as a defendant instead of the City of Kansas City; and, second, whether the trial court erred in ruling Plaintiff had not timely filed his lawsuit within the ninety day time frame allowed by the Missouri Human Rights Act.[1]

The Supreme Court has jurisdiction as this cause presents issues of general interest, involves conflicts of opinion between the districts and concerns matters of first impression regarding the construction of the Missouri Human Rights Act.

[1] Citation to L.F. refers to Appellant's legal file.

STATEMENT OF FACTS

John Hammond was employed as a Correctional Officer I at the Municipal Correction Institute in Kansas City, Missouri [hereinafter MCI] from approximately January 1997 through September, 1999. (L.F. 0081). He was terminated from his position on or about September 16, 1999. (L.F. 0081). Mr. Hammond alleges that he suffered discrimination at the hands of his superiors and others at the jail.

After Plaintiff revealed he had a mental illness controlled by medication, he believes he was targeted for discrimination by officials at MCI. [L.F. 0082]. During the course of his employment and following his informing his superiors of his condition, he believes he was singled out for discipline which ultimately lead to his termination and subsequent poor references from MCI to prospective employers. [L.F. 0081 - 0085].

The first act of discrimination occurred on March 25, 1998. At that time, Plaintiff received a letter of counseling regarding dependability even though he had not exceeded his own sick time and had fully documented his absences as necessary to his disability. [L.F. 0082]. He was also given a ninety day special rating. [L.F. 0082]. That rating requires an individual to improve on the areas described or be subject to termination. On or about

June 23, 1998, Mr. Hammond was told that the special rating placed on him had been invalid. [L.F. 0082].

Then, on October 11, 1998, Mr. Hammond received a predetermination letter indicating he had been recommended for termination. [L.F. 0082]. Two days later, he was inexplicably given another letter of reprimand indicating that if his attendance did not improve, he would be recommended for a predetermination hearing regarding separation from his employment. [L.F. 0082]. Then, on November 14, 1998, Plaintiff was suspended indefinitely by Captain Kreisler for violating the City's zero tolerance policy for violence in the work place. [L.F. 0082]. He was exonerated from that charge. [L.F. 0082].

He told individuals who were in a supervisory capacity over him that he suffered from a serious mental disorder that was fully controlled by medication. [L.F. 0082-083]. This revelation was necessary to justify his sick leave. A supervisory employee told Mr. Hammond that individuals with mental disorders could not work for MCI, that his complaints regarding his treatment evidenced his mental illness and that he should find a new position. [L.F. 0083].

Mr. Hammond was then again placed on a ninety day special rating with termination to occur if he did not improve his attendance. [L.F. 0083].

Then, approximately six months later, he was once again exonerated regarding his attendance and his rating was changed to satisfactory. [L.F. 0083].

Because of the pressure placed on him by this treatment, Mr. Hammond had to take extra time off to facilitate his disability. At all times, he provided the necessary paperwork and was qualified for the time pursuant to FMLA. [L.F. 0083]. His leave requests were routinely denied and on January 23, 1999, Mr. Hammond's pay was docked for no discernible reason. [L.F. 0083].

On or about May 15, 1999, Mr. Hammond received a verbal reprimand indicating that he had not been at his post. This allegation was untrue. He was at the post assigned to him at all times during the night in question. [L.F. 0083-0084].

Mr. Hammond became the butt of many jokes. On one occasion, he was charged with formatting a dormitory roster on the computer, even though he had no computer skills and cannot type. Neither typing nor computer skills were a necessary qualification for his job. While he was at the computer, he was ridiculed and belittled by his supervisors and others. [L.F. 0084]. The ridicule concerning his condition continued both by his

supervisors and by co-employees who had no reason to know of Mr. Hammond's mental condition. [L.F. 0084].

On June 3, 1999, Mr. Hammond was given another letter of reprimand that was grieved and subsequently revised. Then, on August 6, 1999, Plaintiff was terminated for conduct 'reflecting discredit to the city, destruction of property, misconduct and violation of Human Relations Rule VII Section 7.2d. Plaintiff did not engage in the action of which he was charged. [L.F. 0084]. Further, other individuals had actually violated the policy in the manner in which plaintiff had been accused, but were not terminated. [L.F. 0083 - 0084].

Mr. Hammond's termination became effective on September 16, 1999. Plaintiff was unjustly terminated from his position for "using unnecessary force" in an altercation with an inmate. [L.F. 0084].

During his employment, Plaintiff was written up unjustly on many occasions for actions he did not do and for absences which were properly chargeable as FMLA absences. These write ups were an effort for the supervisors to attain the graduated discipline against Mr. Hammond, up to and including termination. [L.F. 0084].

Since his termination, MCI has given Mr. Hammond poor references and reviews and has used his personnel file to deny him commensurate

employment. [L.F. 0084]. The matters contained in the personnel file reflect the discrimination Mr. Hammond endured during his employment. [L.F. 0049].

Mr. Hammond carried all of his complaints to the Equal Employment Opportunity Commission and to the Missouri Human Rights Commission. He received rights to sue from each agency on each complaint, instead of the complaints having been consolidated by the agencies into a single case. He received right to sue letters from the Missouri Human Rights Commission that were dated February 9, 2000, March 21, 2000, August 31, 2000 and February 22, 2001. [L.F. 0031, 0028, 0027, 0030]. He received right to sue letters from the EEOC dated December 7, 1998, November 23, 1999, March 7, 2000, August 31, 2000. He filed suit on June 20, 2000. [L.F. 0051].[2]

The acts of which Mr. Hammond complains were continuing in nature and evidence a longstanding pattern of harassment directed toward Mr. Hammond due to his perceived mental disability. The question in this matter will largely focus on whether Mr. Hammond timely filed his action. [L.F. 0065].

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[2] In actuality, the Petition was hand carried to the courthouse on June 19, 2000 by a paralegal from the office of Rebecca Randles. However, for some reason, the returned copy was file stamped June 20, 2000.

POINTS RELIED ON

I. The Trial Court Erred in dismissing Plaintiff's Discrimination Claims under the Missouri Human Rights Act for failure to name the proper party because as set forth in R.S.Mo. 55.33(c), the proper party was on notice of the proceedings and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the proper party in that the proper party in this action appears to be the City of Kansas City, of which the Municipal Corrections Institute is a subdivision, the City of Kansas City is an "employer" within the definitions found in the MHRA, and the City of Kansas City was actually served by personal service in the matter.

II. The trial court erred in granting defendant's Motion to Dismiss Plaintiff's discrimination claims under the MHRA on the grounds that Plaintiff failed to timely file his lawsuit because in the case of multiple right to sue letters being issued a Plaintiff cannot file a lawsuit on each but must file within ninety days of at least one of the letters, in that plaintiff received a total of eight right to sue letters, four from the Missouri Human Rights Commission and four from the Equal Employment Opportunity Commission and plaintiff prematurely filed his lawsuit prior to the receipt of the last two

MHRC Right to Sue letters but amended his petition to include those letters making his filing of his lawsuit on June 19, 2000 timely.

ARGUMENTS

I. The Trial Court Erred in dismissing Plaintiff's Discrimination Claims under the Missouri Human Rights Act for failure to name the proper party because as set forth in R.S.Mo. 55.33(c), the proper party was on notice of the proceedings and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the proper party in that the proper party in this action appears to be the City of Kansas City, of which the Municipal Corrections Institute is a subdivision, the City of Kansas City is an "employer" within the definitions found in the MHRA, and the City of Kansas City was actually served by personal service in the matter.

A. INTRODUCTION

Plaintiff filed his petition for damages for employment on June 20, 2000, naming the Municipal Corrections Institute as defendant. [L.F. 0092]. Defendant subsequently filed a Motion to Dismiss, alleging that the Municipal Corrections Institute cannot be sued. [L.F. 0068]. In that motion, defendant sets forth that MCI is actually a subdivision of Kansas City, Missouri, falling within the Kansas City Municipal Code Section 2-521

entitled “Divisions” in which correctional facilities are enumerated as part of the neighborhood and community services department. Code Section 2-523; [L.F. 0069].

In that section, defendant also admits that Kansas City, Missouri may be sued. The briefing states: “Kansas City . . . may sue and be sued, implead and be impleaded, defend and be defended in any court . . .” [L.F. 0068]. Since Kansas City, Missouri employs more than six persons, it is a proper defendant under the MHRA definition of employer. R.S.Mo. 213.101.

Therefore, Plaintiff filed his First Amended Petition to rename the plaintiff as The City of Kansas City. Defendant was actually served with the First Amended Petition on April 6, 2001. Plaintiff’s Petition was not served because Plaintiff knew a subsequent right to sue letter was forthcoming and the internal administrative procedures were still in process. Therefore, Plaintiff moved to amend his complaint in November 2000 and that amendment was granted on or about January 28, 2001. [L.F. 0088-0089].

B. STANDARD OF REVIEW

The appellate court may review dismissals de novo. Plaintiff’s case cannot be dismissed unless he has presented no colorable claim in the

petition. The Court must examine the pleadings, construe them broadly and treat all facts as true. All inferences must be made in favor of the plaintiff. Shockley v. Harry Sander Realty Company, 771 S.W.2d 922, 924 (Mo.App. 1989). When a defendant interposes a Motion to Dismiss, the Court must construe the pleadings in plaintiff's favor, "allowing them their broadest intendment, treating all facts as true . . ." Anderson v. Griffin, Dysart, Taylor, Penner & Lay, 684 S.W.2d 858, 859 (Mo.App. 1984).

C. THE CITY OF KANSAS CITY HAS PROPERLY BEEN SUED IN THIS MATTER

In its Motion to Dismiss, Defendant contends that MCI is not a proper defendant as it is a subdivision of Kansas City, Missouri. As set forth above, defendant admits that the City of Kansas City, Missouri may be sued. Therefore, the City of Kansas City, Missouri is an appropriate defendant. [L.F. 0068]. Plaintiff properly served the City with his First Amended Petition, placing the City on notice of the pending action. The Return of Service indicates the city was served on April 6, 2001. [L.F. 0059]. In fact, the City of Kansas City was a named defendant on every petition – the original, the amended, and the second amended petition. [0092].

At all times, the City was on notice of the action and knew it was the real party in interest. Defendant makes this concession in its Motion to

Dismiss in which it sets forth that Kansas City, Missouri may sue and be sued, but that the divisions of the city have no separate identity. [L.F. 0069]. Therefore, to sue the divisions, one must sue the City.

This Motion to Dismiss was filed by the City Attorney after the City was served with the Amended Petition. [L.F. 0068-0071]. Therefore, the City was on notice that it was the proper entity to be named in the lawsuit. This situation creates a misnomer. Jones v. Western Missouri Mental Health Center, 840 S.W.2d 278 (Mo.App. W.D. 1992); Watson v. E.W. Bliss Co., 704 S.W.2d 667 (Mo.banc 1986).

The proper remedy for a misnomer is to amend the petition to name the proper party. Jordan v. Green, 903 S.W.2d 252 (Mo.App. W.D. 1995). In this case, Plaintiff did timely amend and serve the proper defendant. Defendant relies on the case of Jordan v. Green, supra for the proposition that dismissal may result in instances where the proper party has not been sued. However, that case is distinguishable from Mr. Hammond's situation, as in Jordan, the Court, in a previous hearing, made it clear that Jordan's case was dismissed because he failed to request amendment of the complaint. Instead, he sought to do so on appeal, in contravention of settled law. See Coty v. Hartford Accident and Indemnity Co., 439 S.W.2d 483 (Mo. 1969).

Once the Petition is amended, that amendment relates back to the time of filing. R.S.Mo. 55.33(c). See also, Watson v. E.W. Bliss Co., 704 S.W.2d 667 (Mo. Banc 1986); Jones v. Western Missouri Mental Health Center, 8490 S.W.2d 278 (Mo.App. W.D. 1992); Bailty v. Innovative Management and Investment, 890 S.W.2d 648 (Mo banc 1994). Therefore, in this matter, plaintiff's Petition should be amended and relate back to the time of filing.

D. THE CITY OF KANSAS CITY IS AN EMPLOYER UNDER THE MISSOURI HUMAN RIGHTS ACT

The MHRA defines an employer as:

> the State, or any political subdivision thereof or *any person employing six or more persons* within the State and any person directly acting in the interest of the employer, but does not include corporations and associations owned and operated by religious or sectarian groups;

R.S.Mo. 213.010.

The City of Kansas City, Missouri clearly falls within the statute, as does its subdivision MCI. Both are employers of six or more persons and neither is owned or operated by a religious or sectarian group. Therefore, by amending to add Kansas City, Missouri, Plaintiff has properly filed suit against an "employer" within the meaning of R.S.Mo. 213.010.

Defendant claimed in its reply brief that Plaintiff had abandoned the argument, conceding that either MCI or Kansas City was not an employer

under the Missouri Human Rights Act.[L.F. 0041]. However, that simply is not so. Plaintiff did not set forth this small argument in a separate subhead, but the argument itself is found in the Opposition to Defendant's Motion to Dismiss. [L.F. 0053 – 0054].

E. CONCLUSION

Plaintiff did initially sue Municipal Corrections Institute. Based upon the certified copies of the Municipal Ordinances, it appears that Municipal Corrections Institute is a subdivision of the City of Kansas City and not a separate corporation. Upon learning of this, Plaintiff moved to file an amended petition, was granted the right to amend that petition and served defendant Kansas City with the amended petition. Kansas City knew or had reason to know it was the proper defendant in the matter. Further, the City of Kansas City was actually named in each petition on file with the court, including the original petition, the First Amended Petition and the Second Amended Petition. Plaintiff's petition should not have been dismissed for failure to assert an action against a "suable" party. Kansas City, Missouri is the proper party and is "suable."

II. **The trial court erred in granting defendant's Motion to Dismiss Plaintiff's discrimination claims under the MHRA on the grounds that Plaintiff failed to timely file his lawsuit because in the case of multiple right to sue letters being issued a Plaintiff cannot file a lawsuit on each but must file within ninety days of at least one of the letters, in that plaintiff received a total of eight right to sue letters, four from the Missouri Human Rights Commission and four from the Equal Employment Opportunity Commission and plaintiff prematurely filed his lawsuit prior to the receipt of the last two MHRC Right to Sue letters but amended his petition to include those letters making his filing of his lawsuit on June 19, 2000 timely.**

A. INTRODUCTION

Plaintiff timely filed his Petition. Actually, it was probably prematurely filed, but that issue has been waived by Defendant and has been corrected by subsequent events. Plaintiff received his second right to sue letter from the Missouri Human Rights Commission on March 23, 2000. It was dated March 21, 2000. [L.F. 0086]. Plaintiff filed suit on June 20, 2000, 91 days after the date of the letter, but only 89 days from receipt.

Thereafter, Plaintiff received right to sue letters dated August 31, 2000 and February 21, 2001. [L.F. L.F. 0031, 0028, 0027, 0030]. All of the

Right to Sue letters concerned separate events which were related to each other. Plaintiff pleaded these events in his petition. [L.F. 0095 – 0096]. He further pleaded that these events gave rise to a continuing violation and constituted a pattern of discrimination against him. [L.F. 0084 – 0085]. Further, the events set forth in each of the charges occurred 180 days or less prior to Mr. Hammond's bringing it to the Human Rights Commission and the events occurred less than 300 days from each other.

The Human Rights Act, patterned after Title VII, requires a Plaintiff to file a charge within 180 days of the alleged discriminatory incidents. 42 U.S.C. 2000e-5(e)(1); R.S.Mo. 213.075.1. Plaintiff complied with each of these requirements. Further, very recent Supreme Court and 8th Circuit precedent makes clear that charges alleging a continuing violation of Title VII will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period. National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 122 S.Ct. 2061, 2077 (2002); Mems v. City of St. Paul, 327 F.3d 771, 784 (8th Cir. 2003). Therefore, Mr. Hammond has fully complied with the administrative exhaustion elements of his claim. Each charge was timely filed.

B. PLAINTIFF PREMATURELY FILED HIS PETITION AS SUBSEQUENT RIGHT TO SUE LETTERS BASED ON REASONABLY RELATED ACTIONS WERE ISSUED

Plaintiff was entitled to bring his action within ninety days of receipt of his final right to sue letter from the Missouri Human Rights Commission. That letter was dated February 21, 2001, requiring suit to be filed on or about May 2001. Plaintiff beat that filing deadline by eleven months. His petition was filed on June 20, 2000. [L.F. 0092].

1. In Multiple Right to Sue Situations, Plaintiff May Rely on the Last Right to Sue Where the Issues Are Reasonably Related

The receipt of a right to sue letter is not a jurisdictional prerequisite to suit under the Missouri Human Rights Act (MHRA). It is a condition precedent to filing. Filing prior to receipt of a right to sue letter can be cured after the action has begun. Vankempen v. McDonnell Douglas Corp., 923 F.Supp. 146 (E.D. MO. 1996). In this situation, Plaintiff filed his petition in June, 2000 but did not receive his final right to sue letter until February, 2001. He did amend his petition to include the issues found in the final letter, and therefore, his action was timely filed and should not have been dismissed.

In situations in which multiple right to sue letters are issued, a plaintiff may use the last right to sue in which to file his case if the issues are reasonably related. Brown v. Continental Can Co., 765 F.2d 810 (9th Cir. 1985). This is an issue of first impression for the state of Missouri, however, the statutory scheme of the MHRA is coextensive with Title VII and Title VII case law should apply. Pollock v. Wetterau Food Distribution Group, 11 S.W.3d 754, 762 (Mo.App. 1999).

2. The Court of Appeals Erroneously Concluded that Appellant Failed to Advise the Trial Court of the Existence of Multiple Right to Sue Letters

The Court of Appeals did not rule on the substance of this issue. Instead, it found that Mr. Hammond's Opposition to the Motion to Dismiss was substantively defective as was the petition filed in the first place. The Court of Appeals opinion suggests that the only question presented to the trial court in Mr. Hammond's Suggestions in Opposition was whether his petition was adequately supported by the March 21, 2000 letter from the MCHR. It then quotes the trial court's dismissal in which it indicates that only one letter was attached to the petition – a Right to Sue letter dated March 21, 2000. Based upon this, the appellate court could find no error in the lower court's opinion.

The finding by the appellate court and the lower court are erroneous for three reasons. First, the only right to sue letter attached to the original petition was the March 21, 2000 letter, as the remaining letters had not yet been received. Second, in the Motion to Amend Petition that was filed in November 2000 and ruled upon by the Court in January 2001, Plaintiff clearly set forth that additional Right to Sue letters were forthcoming and that another had been received on September 5, 2000. (L.F. 0090) Further, the Amended Petition then included acts that occurred *after* the initial filing. Third, the appellate court requires Plaintiff to present "evidence" of the MCHR letters or suffer dismissal. The Appellate Court has engrafted a requirement of proof on a Motion to Dismiss that is improper.

At the time the original petition was filed, the February 2001 letter had not yet been received and was therefore not included in the petition. Likewise, the Right to Sue letter received on September 5, 2000 was also not yet received. Therefore, they were not appended to the petition.[3]

The Court of Appeals argues that Plaintiff has raised the issue of the multiple Right to Sue letters for the first time on appeal. Such is not the case. That was the *principal* argument raised in the trial court and the Court

[3] There is confusion as to whether an August 31, 2000 right to sue from the MHRC exists as well as one from the EEOC.

of Appeals. See Opposition to Motion to Dismiss. (L.F. 0051 -0058). The Court of Appeals states that no "evidence" of subsequent right to sue letters was presented to the trial court that post dated the March 21, 2000 letter. Again, such is not the case.

In the argument itself, Plaintiff establishes that other, additional right to sue letters were issued after the March 21, 2000 letter, a fact also set forth in the Motion to Amend and the Amended Petition. The trial court was fully apprised that this was a dynamic case and it acknowledged that fact in its Order granting the Motion to Amend. That order states: "Plaintiff notes that he has not served Defendants with the initial Petition due in part to a delay in receipt of a related "Right to Sue" letter . . ." (L.F. 0088)

That the trial court knew of the additional right to sue letters is also evidenced in that after the trial court dismissed based upon the March 21, 2000 letter, Plaintiff filed a Motion for Reconsideration -- which is in effect a Motion for New Trial -- in a timely manner that appended each and every right to sue letter. (L.F. 0020 – 0032). Therefore, the Appellate Court's argument that the trial court did not have sufficient information to conclude that Right to Sue letters issued subsequent to the one appended to the petition existed is erroneous.

Plaintiff did appropriately apprise the trial court of an error of law in its Order dismissing Plaintiff's cause of action. Plaintiff filed a Motion for Reconsideration of the order. Some case law indicates that Motions for Reconsideration has no legal effect as neither the Supreme Court nor the general assembly has authorized motions for reconsideration. Koerber v. Alendo Building Company, 846 S.W.2d 729, 730 (Mo.App. 1992). However, where the motion places before the court allegations that it committed errors of law in sustaining the motion to dismiss with prejudice – which is essentially judgment on the pleadings – then the Motion for Reconsideration is on the order of a Motion for New Trial. American Family Mutual Ins. Co. v. Hart, 41 S.W.2d 3d 504, 512 (Mo.App.W.D. 2000). The Motion for Reconsideration was timely filed during the period of time that a trial court maintains jurisdiction to amend its judgments. Ritter Landscaping, Inc. v. Meeks, 950 S.W.2d 495, 496 (Mo.App. E.D. 1997). Further, the Court did rule upon that Motion to Reconsideration and the ruling was made part of this appeal. (L.F. 0006).

The Court of Appeals next indicates that a motion to dismiss for failure to state a cause of action is a test of the adequacy of the plaintiff's petition.[cite omitted]. While that axiom is true enough, the manner in which it has been applied in this case is erroneous. The Court of Appeals

indicates that a plaintiff's petition must include *evidence* of the right to sue letters. Thus, the Court of Appeals places an exact pleading requirement on a Plaintiff to state in the petition exactly when a right to sue letter is received and to append each to the petition. This is not a pleading requirement, but a proof requirement.

Plaintiff fulfilled all that is required to establish jurisdiction and administrative exhaustion in his petition. He stated: "Plaintiff timely filed his charge with the Missouri Human Commission and thereafter, received a Notice of Right to Sue." (L.F. 0095). At the Motion to Dismiss stage, that pleading should be given its broadest intendment. Anderson v. Griffin, Dysart, Taylor, Penner & Lay, 684 S.W.2d 858, 859 (Mo.App. 1984). Plaintiff did explain the existence of and produce the Right to Sue letters subsequent to filing to the Court in reply to the Motion to Dismiss and rulings thereon. No proof requirement should be engrafted upon the Plaintiff to provide "evidence" of a right to sue when filing his petition, as the Court of Appeals would require.

Since the trial court did have notice of the existence of the subsequent Right to Sue letters, this Court should determine the substantive merits of Plaintiff's claim. Serial right to sue letters do occur with some frequency. A plaintiff should not be required – and indeed cannot – file a lawsuit each

time a discriminatory act occurs. In situations in which the actions are reasonably related, a plaintiff should have the right to choose to file based upon later, rather than earlier occurring acts. If the Court subsequently determines that the acts were not reasonably related, the failure to file earlier rests with the claimant. He delays filing at his own risk. Brown v. Continental Can Co., 765 F.2d 810 (9th Cir. 1985).[4]

3. The Appellate Court Erroneously Concluded that the 90 Day Filing Deadline Is A Statute of Limitation that Should Be Strictly Construed

The federal courts are unanimous that the Equal Employment Opportunity Act is a remedial statute to be liberally construed in the favor of the victims of discrimination. A technical reading of the statute would be "particularly inappropriate in a statutory scheme in which laymen,

[4] The Court of Appeals also asks whether a Right to Sue letter from the EEOC gives rise to a right to sue under the MHRA. That is an issue that was not briefed at the lower court or trial court level and should receive no ruling by this Court. The Missouri Human Rights Commission, EEOC and Kansas City Human Relations Department have work sharing agreements that could affect how right to sue letters are issued and whether they are interchangeable. Because the issue is fairly complex and it has not been briefed below, we would ask this Court not to consider this issue.

unassisted by trained lawyers, initiate the process. Zipes v. Transworld Airlines, Inc., 455 U.S. 385, 397 102 S.Ct. 2234, 56 L.Ed.2d 234 (1982). Thus in the situation of multiple right to sue letters, using the last right to sue as his limitation date is an appropriate action by plaintiff. Further, this Court should not be concerned with the internal workings of the Missouri Human Rights Commission that chose to investigate four separate charges of discrimination instead of consolidating or amending the original charge. The Plaintiff should not be required to file separate lawsuits for each charge, but instead, should do as he has done – bring them all together in one suit. Brown v. Continental Can Co., 765 F.2d 810 (9th Cir. 1985).

The Appellate Court erroneously depicts the 90 day filing deadline as a statute of limitation, and therefore subject to strict construction. It states: "Statutes of limitation are favored in the law, and cannot be avoided unless the party seeking to do so brings himself within an exception enacted by the legislature. Statutes of limitation may be suspended or tolled only by specific disabilities or exceptions enacted by the legislature and the courts cannot extend those exceptions.[citations omitted]"

The filing deadline is not a statute of limitation. It is a condition precedent to the filing of a cause of action. Vankempen v. McDonnell Douglas Corp., 923 F.Supp. 146 (E.D. Mo. 1996). Several federal cases

liken the filing deadlines and other administrative exhaustion requirements to a statute of limitation, as these conditions precedent act not as a jurisdictional bar but a bar to a remedy. See, e.g., Thompson v. White, No. 01C75 (N.D. Ill. 2002)(45 day time frame to contact EEO counselor in federal government employment case condition precedent not jurisdictional bar); Johnson v. Runyon, 47 F.3d 911, 917 (7th Cir. 1995).

In all decisions that have reached the issue, the Courts have found that the 90 day filing deadline and other administrative exhaustion deadlines are subject to equitable tolling. Equitable tolling of these deadlines has been granted for a variety of reasons, from intentional misconduct of a defendant to misleading information from the EEOC to "excusable ignorance" of a claimant's statutory rights. See American Airlines, Inc. v. Cardoza-Rodriguez, 133 F.3d 111, 124 (1st Cir. 1998); Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990); Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984); Zipes v. TransWorld Airlines, Inc., 455 U.S. 385 (1982).

In the lower court opinion, the Court indicates that the 90 day filing deadline should be strictly construed even though the statute to which it applies is a remedial statute which should be liberally construed. The lower court also indicates that the legislature must specifically enact suspension or

tolling provisions for that deadline. In other words, in contrast to the Federal scheme and the Missouri case law that indicates that MHRA is remedial in nature, the lower court advocates abrogating the doctrine of equitable tolling and broad construction for a strict construction approach to this deadline. Established Missouri case law indicates that the administrative deadlines under the MHRA are and should be subject to principles of waiver, estoppel and equitable tolling. Thompson v. Western-Southern Life Assurance Co., No. ED 80263 (Mo.App. E.D. 2002) *citing* Pollock v. Wetterau Food Distribution Group, 11 S.W.3d 754, 762 (Mo.App. 1999). The Court of Appeals, then, by advocating a strict construction of the 90 day filing deadline would abrogate the current state and federal scheme surrounding these administrative deadlines.

Under the MHRA, the statute of limitations for a cause of action is two years. In holding that the filing deadline constitutes a statute of limitation, the Court of Appeals relies on Hill v. John Chezik Imports, 797 S.W.2d 528 (Mo.App. 1990). Hill dealt with the question of whether a state claim pending in Federal Court and subsequently dismissed was tolled during the pendency of the federal action. The Court held that the two year statute was not tolled by the Federal filing. Hill does not address the 90 day filing deadline or the administrative exhaustion requirements under MHRA.

In this matter, Appellant clearly filed his action within two years of the acts which gave rise to his cause of action. He therefore meets the requirements of Hill.

C. THE VIOLATIONS ALLEGED WERE CONTINUING IN NATURE AND THEREFORE RELATED BACK TO THE DATE OF FILING

As to the August 31, 2000 charge and the February 2001 rights to sue, Plaintiff's complaint was timely filed. Couveau v. American Airlines, Inc., 218 F.3d 1078 (9th Cir. 2000). Once plaintiff's petition was filed and amended, the Court may consider any actions occurring within 300 days of the date of the charge for purposes of compensatory damages, but may consider actions even older if the discrimination is part of a pattern or practice.

1. The United States Supreme Court and 8th Circuit Clarified Continuing Violation Theory After the Briefing in the Court of Appeals

The United States Supreme Court recently issued an opinion that clarified significant questions regarding how the continuing violation doctrine is to be applied in Title VII cases. In National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 102 (2002), the Supreme Court

differentiated between "discrete" discriminatory acts and "continuing violations." It determined that a Title VII who raises claims of discrete discriminatory or retaliatory acts must file his charge with in the appropriate time frame set forth in 42 U.S.C. 2000e-5(e)(1). However, a charge alleging a hostile work environment claim will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period. Id. at 121.

The 8th Circuit -- after the briefing in this matter at the Court of Appeals – followed this decision in Mems v. City of St. Paul, 327 F.3d 771, 784 (8th Cir. 2003). It stated "a charge alleging a hostile work environment claim will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." Id. at 784. This holding overrules Ashley v. Boyle's Famous Corned Beef Co., 66 F.3d 164 (8th Cir. Banc 1995) and Pollack v. Wetterau Food Distribution Group, 11 S.W.3de 754, 763 (Mo.App. 1999) as they concern continuing violations. Both cases had previously held that plaintiffs could recover only for discrimination occurring within the statutory period. Continuing violations could be pleaded as support for current claims of discrimination but would not support recovery.

The holding in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 102 (2002) and its progeny directly affect Mr. Hammond's situation. If John Hammond missed the ninety - day deadline for filing his lawsuit following the issuance of his right to sue, in his unusual factual situation that failure has no practical effect. Mr. Hammond effectively amended into his petition the subsequent discriminatory acts for which Right to Sue letters were issued. Therefore, his petition became a viable claim for relief with regard to the discriminatory acts that were added. Regardless of whether the previous acts were discrete discriminatory acts or continuing violations, they were "saved" by the subsequent amendment.

Mr. Hammond alleged in his petition and at all levels of this appeal that the violations of which he complained were continuing in nature. Therefore, if any act occurred within the time frame of the last Charge of Discrimination / Right to Sue letter and the other acts constitute an ongoing pattern or practice, then he may appropriately admit evidence of all such acts, regardless of when they occurred. In this situation, assuming Mr. Hammond is able to prove that the acts were part of a continuing pattern, then the missed filing deadline (if any) is a nullity as he did meet the filing deadline of the subsequent right to sue letters. Each charge of discrimination was timely filed; he missed no other filing deadlines; therefore, the

continuing acts were preserved by the subsequent EEOC / MHRA charges. See National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 102 (2002), Mems v. City of St. Paul, 327 F.3d 771, 784 (8th Cir. 2003). If the actions which underlie his charge of discrimination for which he received a right to sue on March 21, 2000 were part of that continuing violation, then they are effectively added to the petition even if he missed the filing deadline. Mr. Hammond has made the appropriate pleading alleging that the defendant engaged in a concert of action to discriminate against Mr. Hammond from 1998 and continuing through the year 2000. (L.F. 0046 - 0047). These allegations are sufficient to allege a continuing violation and every fact pleaded must at this stage be taken as true. Therefore, the acts which underlie the Charge of Discrimination for which the March 21, 2000 right to sue was granted are part of his current case.

In Mr. Hammond's case, even if the acts are considered to be "discrete" acts of discrimination and not part of a continuing violation, then Mr. Hammond's claims arising from the March 21, 2000 Right to Sue letter are still timely and have been preserved. That is because the acts alleged in the final three complaints of discrimination all occurred within three hundred days of each other. Where discrete acts of discrimination are perpetrated, any occurring within three hundred days of the filing of a charge

of discrimination may be actionable. Therefore, since Mr. Hammond did amend his petition to include those subsequent acts, he may properly present evidence regarding the issues found in the charge of discrimination for which he received the right to sue on March 21, 2000 even if this Court finds that his attempt to file his petition on June 20, 2000 was not timely.[5]

2. The Court of Appeals Relies On Superseded Case Law

The Court of Appeals in analyzing plaintiff's argument concerning continuing violation makes two errors of law. First, the Court misstates the state of the law concerning continuing violations, relying on superseded authority. The Court relies upon Ashley v. Boyle's Famous Corned Beef Co., 66 F.3d 164, 168 (8th Cir. Banc 1995) which was superseded by the holdings in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 102 (2002), and Mems v. City of St. Paul, 327 F.3d 771, 784 (8th Cir. 2003). The Appeals Court also relies upon Pollack v. Wetterau Food Distribution Group, 11 S.W.3d 754, 763 (Mo.App. 1999). Pollack relied upon Ashley

[5] Mr. Hammond's last three complaints of discrimination all concerned his termination in some manner. The City of Kansas City has an arduous termination and appeal procedure. The Charges of Discrimination involved his pretermination notice, his notice of termination, his termination and subsequent acts perpetrated by the City concerning his personnel file.

for its findings on continuing violation. Since Ashley is no longer good law on that issue, Pollack is at least suspect.[6] As Missouri has relied strongly on Federal precedent to construe the MHRA, it should follow the lead of the Supreme Court and the Eighth Circuit on this issue as well.

3. The Court of Appeals Inappropriately Requires Proof At the Pleading Stage

Second, the Court of Appeals takes issue with Appellant's Petition for failing to specify which facts have been investigated by the EEOC and the Missouri Human Rights Commission. To the extent that the Court seeks to know which agency investigated which events, the "dual filing" and work share agreements between the two agencies contemplate that each agency is deemed to have investigated each complaint.

The opinion may also be read to impose an onerous pleading requirement on a plaintiff. It appears to require Plaintiff not only to plead the facts and lay out the discriminatory actions, but to establish by specific reference to the Charge and Right to Sue, which facts were investigated in each charge. Then, the Court orders a plaintiff to make legal conclusions as

[6] In fairness, appellant cited these cases in his briefing to the Court of Appeals. However, Mems had not yet been decided at the time of briefing and Morgan had been decided just shortly before.

to how each of those facts is related. These special pleading rules are not required by the rules of civil procedure and should not now be engrafted. The Rules of Procedure require a plaintiff to set forth a plain statement of facts, not legal conclusions or elements of proof in the petition. Mo.R.Civ.Pro. 55.05. Again, the Court of Appeals requires the introduction of proof in the petition, not merely an exposition of facts. Such a requirement is onerous and in light of the rules, erroneous.

4. Plaintiff's Allegations of Continuing Violation Render all Acts Timely At This Stage of the Proceedings

In this case, Plaintiff actually continually complained to the EEOC and MHRC regarding his treatment at MCI because of the pattern of calling him names like "crazy" and engaging in actions intending to humiliate and distress him because of his psychological condition. Those "pattern and practice" complaints are found in the charges preceding the March 21, 2000 right to sue and the subsequent charges. Regardless of whether the plaintiff proves the existence of a pattern or practice for purposes of the pleadings, Plaintiff may allege them and avoid a motion to dismiss if the Petition was filed timely on any of the claims. Without a doubt, Plaintiff's petition was timely filed regarding all right to sue letters issued subsequent to the March

21, 2000 letter. Therefore, his case should not be dismissed. Ashley v. Boyle's Famous Corned Beef Co., 66 F.3d 164 (8th Cir. 1995).

D. THE NINETY DAY LIMITATION RUNS FROM RECEIPT OF THE NOTICE NOT MAILING

The lawsuit itself was filed on June 20, 2000, 91 days from the date written on bottom of the second right to sue letter from the Missouri Human Rights Commission, but within 90 days of receipt. Under Title VII, a lawsuit must be filed within ninety days of receipt of the notice. See Streeter v. Joint Indus. Bd. Of Elec. Indus., 767 F.Supp. 520 (S.D.N.Y. 1991); Plunkett v. Roadway Express, Inc., 504 F.2d 417 (10th Cir. 1974); Russell v. American Tobacco Co., 528 F.2d 357 (4th Cir. 1975).

This Court has not specifically addressed whether the ninety day time frame under the MHRA runs from the date of the letter or its receipt and has also not addressed whether the three day mailing rule applies in such situations. R.S.Mo. 44.01. However, the case law generally favors the date of receipt. This Court should adopt the date of receipt, for three reasons.

1. MHRA Should Be Coextensive with Title VII Law

First, the Missouri Human Rights Act is coextensive with Title VII of the Federal Civil Rights Acts. It is intended to be coextensive and Federal

case law applies to the Missouri act with the same force and effect as state law. "Finally, we note that in deciding cases brought under the MHRA, we are guided not only by Missouri law, but also by applicable federal employment discrimination decisions." Pollock v. Wetterau Food Distribution Group, 11 S.W.3d 754, 762 (Mo.App. 1999). Therefore, since the 90 day period in which to file suit runs from receipt in the federal system, logically the same deadlines should apply in the state process as well.

Unfortunately, there are significant conflicts among the Courts of Appeal as well as Federal district Courts interpreting R.S.Mo. 213.111. The Eastern District Court of appeals has stated that "suit must bed filed within 90 days of *receipt* of a Right to Sue letter. Lee v. Junior College District, 1995 WL 363, 723 p. 6 (E.D. Mo. 1995). Likewise, in Berkowski v. St. Louis County Board of Election Commissioners, 854 S.W.2d 819 (Mo.App.E.D. 1993), the Court states "both the federal and state statutes require a civil suit to be filed within ninety days of *receipt* of the right to sue letter." R.S.Mo. 213.111.1; 42 U.S.C.2000e-5(f)(1). The state statute further provides that a civil suit should not be filed later than two years after the discriminating act occurred."

The Southern District Court of Appeals also indicates that MHRA claims must be filed within ninety days of receiving a notice of right to sue. See O'Brien v. Blockwell-Baldwin, Inc., 819 S.W.2d 417, 419 – 420 (Mo.App.S.D. 1991). Further, the federal courts that have interpreted R.S.Mo. 213.111 have nearly unanimously held that a suit must be filed within ninety days of the receipt of the notice. See Vankempen v. McDonnell Douglas, 923 F.Supp. 146, 149 (E.D. Mo. 1996)(plaintiff met MHRA requirement that suit be filed "within ninety days after receipt of notice of right to sue."); Hill v. John Chezik Imports, 869 F.2d 1122, 1124 (8th Cir. 1989)(The ninety day period for filing suit under Title VII begins to run on the day the right to sue letter is received at the most recent address that the plaintiff has provided the EEOC).

Additionally on April 1, 2003, this Court denied a writ of prohibition brought on this very same issue in the matter of State of Missouri ex. rel. Jeremiah W. Nixon v. Brown, No. SC85133. In Brown, the trial court ruled that the filing of the cause of action was timely as it occurred within 90 days of receiving the notice of right to sue, although more than ninety days from the date on the letter itself. The Relators / Defendants requested this Court to prohibit further litigation in the matter alleging the filing to have been untimely. This Court refused the writ of prohibition, allowing to stand a

decision that is diametrically opposite the trial court's decision in this matter. The denial of writ let stand the most appropriate construction of MHRA's filing deadline.

2. Statutory Construction Favors The Filing Deadline Running From Receipt of Notice Not the Date of Generation of the Letter

Rules of statutory construction require this result. The statute is silent as to whether the 90 day time frame runs from the date of mailing of the notice or the date of receipt.

Statutory construction dictates that R.S.Mo. 213.111 be read such that the filing deadline begins running from the date of receiving the notice, not the date printed at the top of the letter. "The seminal rule of statutory construction directs this court to

determine the true intent of the legislature, giving reasonable interpretation in light of the legislative objective." Acme Royalty Co.v. Dir. of Revenue, 96 S.W.3d, 72, 74[3] (Mo.banc 2002). Where the statute's language is clear and unambiguous, there is no room for statutory construction. Wolff Shoe Co. v. Dir. of Revenue, 762 S.W.2d 29, 31 (Mo.banc 1988). The language of R.S.Mo. 213.111.1 is ambiguous. That statute reads as follows:

> If, after one hundred eighty days from the filing of a complaint alleging an unlawful discriminatory practice . . . the commission has

not completed its administrative processing and the person aggrieved so requests in writing, the commission shall issue to the person claiming to be aggrieved a letter so indicating his or her right to bring a civil action within ninety days of *such notice* (emphasis added) against the respondent named in the complaint. If after the filing of a complaint . . .as it relates to housing, and the person aggrieved so requests in writing, the commission shall issue to the person claiming to be aggrieved a letter indicating his or her right to bring a civil action within ninety days of such notice against the respondent named in the complaint. Such an action may be brought in any circuit court in any county in which the unlawful discriminatory practice is alleged to have occurred, either before a circuit or associate circuit judge. Upon issuance of this notice, the commission shall terminate all proceedings relating to the complaint. No person may file or reinstate a complaint with the commission after the issuance of a notice under this section relating to the same practice or act. Any action brought in court under this section shall be filed within ninety days from the date of the commission's notification letter to the individual but no more than two years after the alleged cause occurred or its reasonable discovery by the alleged injured party."

R.S.Mo.213.111.1.

In the decision below, the Court of Appeals determined that the statute used terms interchangeably and thereby caused confusion. "We agree with Hammond that the first two sentences are not clear as to whether the notice of the right to sue runs from the date the letter is issued or on the date the letter is received. This is because the drafters used the words "letter" and "notice" interchangedly, except for the last sentence, in which they used the words "notification letter." Court of Appeals Decision at 11. The Court of Appeals indicates that the last sentence clarifies the potential confusion by referencing the terms "notification letter." However, to this reader, it only confuses the issue more by infusing a third, undefined term that again does not specify whether the action is valid upon writing, mailing or receipt.

In situations in which the language of a statute is not clear, a Court must be cognizant of two things. First, a court must be cognizant of the purpose of the statute. A statute is not to be interpreted narrowly if such an interpretation would defeat the purpose of the legislation. St. Louis County v. B.A.P., Inc., 25 S.W.3d 629, 631 (Mo.App. 2000). In common legal parlance, "notice" is typically synonymous with receipt. That is why the Rules of Civil Procedure favor personal service and service via certified mail over other forms of service and typically require "actual notice" of actions.

Therefore, the term "notice" and "notification letter" must refer to the receipt of the paper, not the generation of it.

Again, the MHRA is a broadly remedial statute for which liberal construction is necessary. Vankempen v. McDonnell Douglas Corp., 923 F.Supp. 146, 148 (E.D. Mo. 1996). Interpreting the text of the MHRA such that the filing deadline runs from receipt rather than generation of the letter is consistent with legislative intent. The statute actually mentions the ninety day period twice. On first reference, it states "the Commission shall issue to the person claiming to be aggrieved a letter indicating his right to bring a civil action within 90 days of such notice against the respondent named in the complaint." 213.111.1. This phrase "such notice" means the claimant has ninety days after he learns of the right to sue to bring suit. He learns of the existence of the letter by receiving it. A contrary interpretation violates the spirit of the statute, as it would mean that a claimant could have fewer than ninety days to file suit, depending entirely on when the Commission chose to mail the letter.

In this case, the issue has boiled down to the date on the letter versus the date received. Whether the letter was actually *mailed* on the date at the bottom of the letter has not been at issue. Therefore, the Court of Appeals decision would cause the date on the letter itself to be the triggering date,

even if for some reason the letter were not mailed for a period of time. Such a scheme is patently unfair to claimants – particularly if the letter should get lost in a black hole in an administrator's office – and violates the remedial nature of the statute.

Based upon the equitable and remedial nature of the legislation, as well as the common understanding of "notice" meaning "receipt," the most logical construction of this statute is that the filing deadline begins to run at the time the claimant receives the right to sue letter from the MHRC. See Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

3. Equitable Principles Require Either a Three Day Mailing Rule or A Date of Receipt Rule

The receipt of a right to sue letter is not a jurisdictional prerequisite to suit under the Missouri Human Rights Act. Therefore, failure to file within ninety days does not necessarily wrest jurisdiction from the court or render any suit filed out of time a nullity. Rather, the time period is a condition precedent to carrying forward a suit. It is similar to a statute of limitation, not of repose and is subject to equitable tolling under appropriate circumstances. Croffut v. United Parcel Service, Inc., 575 F.Supp. 1264 (E.D.Mo. 1984)(Plaintiff held not to have 'received' notice of right to sue when wife, who signed for it, had accident and was hospitalized on same

day; he received notice only after he found the letter in his wife's purse). Likewise, Mo.R.Civ.Pro. 44.01(e) provides for three days to be added to the prescribed period. That equitable principle may also apply to Right to Sue letters.

CONCLUSION

Plaintiff was forced from his position because of a pattern of discrimination aimed at his psychological condition. The only issues involved in this appeal concern whether Mr. Hammond's complaint was timely filed and if he sued the proper entity. As has been discussed fully, Plaintiff's action was both timely and the proper party has been named and served. Therefore, the trial court erred in dismissing his claims with prejudice.

WHEREFORE, plaintiff John Hammond respectfully requests the Honorable Court to reverse the lower court's ruling and reinstate his cause of action.

Respectfully Submitted,

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CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the above and foregoing document was mailed postage prepaid this 11th day of August, 2003, to the following:

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_____
Rebecca M. Randles